Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1494

In the Supreme Court of the United States

OCTOBER TERM, 1985

FORELAWS ON BOARD, ET AL., PETITIONERS

v.

PETER JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), the test for determining whether the government's position is "substantially justified," for purposes of denying attorneys' fees to the prevailing party, is one of reasonableness.

2. Whether the court of appeals erred in ruling that the government's position was substantially justified in the circumstances of this case.

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OPINIONS BELOW

The opinion of the court of appeals denying petitioners' application for attorneys' fees (Pet. App. A1-A2) is unreported. The opinion of the court of appeals on the merits (Pet. App. C1-C39) is reported at 743 F.2d 677.

JURISDICTION

The amended judgment of the court of appeals was entered on January 21, 1985 (Pet. App. C1). The petitioners' application for attorneys' fees was denied on July 3, 1985 (Pet. App. A1), and a petition for rehearing was denied on November 13, 1985

(Pet. App. B1). The petition for a writ of certiorari was filed on February 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA) is the marketing agent for electric power from federal dams and other sources throughout the Pacific Northwest. Because of projected power shortfalls for that area, Congress in 1980 passed the Pacific Northwest Electric Power Planning and Conservation Act (the Regional Act), 16 U.S.C. 839 *et seq.* The Regional Act provided that "[a]s soon as practicable within nine months after December 5, 1980," BPA "shall commence necessary negotiations for, and offer, initial long-term contracts" to both preference and nonpreference customers (16 U.S.C. 839c (g)(1)).[1] Each customer offered a contract had one year from the date of the offer to accept "such contract." 16 U.S.C. 839c(g)(2). Thus, within 21 months after the Act's effective date, a new system of contracts allocating BPA's supply of power was to be in place. Pet. App. C5.

BPA interpreted Section 839c(g)(1) to require it to complete negotiations and make offers capable of acceptance by BPA's customers within nine months. Draft proposed contracts, the product of negotiations, were not available until six months of the nine-month period had passed. Because the re-

[1] Petitioners twice (Pet. 8, 9) assert that BPA had nine months to make initial *offers*. The statute clearly states, however, that BPA was to offer "initial long-term contracts"—*i.e.*, contracts it was prepared to live with—within nine months, and BPA therefore had only nine months to devise a set of contracts acceptable to it.

maining three months constituted insufficient time to prepare an Environmental Impact Statement (see 42 U.S.C. 4332(2)(c)) BPA concluded that, under *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), an EIS was not required.[2]

Petitioners initiated a proceeding for review of the resulting contracts, seeking an injunction preventing implementation of the contracts and an order compelling preparation of an EIS (Pet. App. C3). Reasoning that BPA could have offered draft contracts prior to completion of negotiations and preparation of an EIS and that negotiations and preparation of an EIS could have continued during the entire 21-month period (Pet. App. C26-C27) the court of appeals ordered BPA to prepare an EIS. However, it denied petitioners' request for an order enjoining the operation of the contracts (Pet. App. C32-C35).

2. Petitioners then filed an application for attorneys' fees under the Equal Access to Justice Act (EAJA), which states in pertinent part that "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party * * * fees and expenses * * * in any civil action * * * against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). The court of appeals denied petitioners' application "because defendants' position in this case of first impression was substantially justified." Pet. App. A2. The court also held that petitioners are not entitled to fees un-

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[2] BPA did prepare an environmental analysis of the effects of the new power sales contracts and circulated it for review.

der 28 U.S.C. 2412(b) because the litigation did not produce a common fund or benefit.[3]

ARGUMENT

Petitioners' arguments concern the standard for determining whether or not the position of BPA was "substantially justified" for purposes of awarding attorneys' fees and expenses under 28 U.S.C. 2412 (d)(1)(A). The Ninth Circuit, in holding (Pet. App. A2) that the position of BPA was substantially justified, cited two previous decisions of that court which held that the test for substantial justification is whether the government's position had a reasonable basis in law and in fact. *United States* v. *First National Bank*, 732 F.2d 1444, 1447 (1984); *Foster* v. *Tourtellotte*, 704 F.2d 1109, 1112 (1983). Petitioners contend (Pet. 16) that the use of a reasonableness test for determining substantial justification is contrary to the intent of the Equal Access to Justice Act, and that a conflict in the circuit exists with respect to that question (Pet. 22-23). Petitioners also assert (Pet. 26-35) that BPA's position, which they say the court below found arbitrary and capricious, could not properly be held to be "substantially justified." None of these contentions has merit.

1. Petitioners' discussion of legislative intent intertwines the legislative history and judicial interpretation of that original EAJA and its 1985 replacement. The original EAJA was repealed by Pub. L. No. 96-481, § 204(c), 94 Stat. 2329, effective October 1, 1984. It was replaced by the 1985 Act, Pub. L. No. 99-80, § 2, 99 Stat. 184-185, which contained the identical language in 28 U.S.C. 2412(d)(1)(A).

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[3] Petitioners do not argue in this Court that the court of appeals erred in denying fees under 28 U.S.C. 2412(b).

But although no change was made in the "substantial justification" standard, the legislative history of the 1985 Act contains conflicting comments on the meaning of that standard. See pp. 8-10, *infra*.

We submit that this case is governed by the original EAJA, not by the 1985 Act.[4] The 1985 Act applies to "cases pending on" August 5, 1985, the date it was enacted. On that date, the only matter pending in the instant case was an application for rehearing en banc from the panel's denial of the fee application. Several courts have held that the original EAJA, which contained the same "cases pending" language, did not apply to cases in which only a fee application was pending on the date of enactment. *Tongol* v. *Donovan*, 762 F.2d 727, 730-733 (9th Cir. 1985); *Nichols* v. *Pierce*, 740 F.2d 1249, 1255-1258 (D.C. Cir. 1984); *Commissioners of Highways* v. *United States*, 684 F.2d 443, 444-445 (7th Cir. 1982). The Fifth Circuit has applied what it described as a "clarifying provision" contained in the 1985 Act to a case in which only the fee application was pending on August 5, 1985. *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1286-1287 (5th Cir. 1985).[5] The Ninth Circuit, however, has recently distinguished *Russell* in a case involving a "change" made by the 1985 Act, ruling that the change was not applicable to a case where only the fee application was pending at enactment. *American*

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[4] The court of appeals found it unnecessary to determine whether the original EAJA or the 1985 Act was to be applied. In any event, the question of which Act applies has little continuing importance.

[5] See also *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986), and *Gotches* v. *Heckler*, 782 F.2d 765, 766-767 (7th Cir. 1986), following *Russell*.

Pacific Concrete Pipe Co. v. *NLRB*, 788 F.2d 586 (1986).

The legislative history of the EAJA as enacted in 1980 expressly states that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 22 (1980). See also H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10, 13-14, 18 (1980); H.R. Rep. 96-1005, 96th Cong., 2d Sess. Pt. 1, at 10 (1980); and S. Rep. 96-253, 96th Cong., 1st Sess. 7 (1979). Insofar as the original EAJA governs this case, the Ninth Circuit's use of the reasonableness standard is thus entirely consistent with Congress's own interpretation of "substantial justification."

The term "substantial justification" was repeatedly interpreted, in cases arising under the EAJA as originally enacted, as requiring only that the government show that its position had a reasonable basis. *Dubose* v. *Pierce*, 761 F.2d 913, 917-918 (2d Cir. 1985); *Donovan* v. *DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1389 (3d Cir.), cert. denied, No. 84-2018 (Oct. 21, 1985); *Anderson* v. *Heckler*, 756 F.2d 1011, 1013 (4th Cir. 1985); *Hanover Building Materials, Inc.* v. *Guiffrida*, 748 F.2d 1011, 1015 (5th Cir. 1984); *Trident Marine Construction* v. *District Engineer*, 766 F.2d 974, 980 (6th Cir. 1985); *Ramos* v. *Haig*, 716 F.2d 471, 473 (7th Cir. 1983); *Keasler* v. *United States*, 766 F.2d 1227, 1231 (8th Cir. 1985); *Albrecht* v. *Heckler*, 765 F.2d 914, 915 (9th Cir. 1985); *United States* v. *Community Bank & Trust Co.*, 768 F.2d 311, 314 (10th Cir. 1985); *Ashburn* v. *United States*, 740 F.2d 843, 850 (11th Cir. 1984); *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1391 (Fed. Cir. 1982).

The District of Columbia Circuit was the only court of appeals that had suggested that, under the original EAJA, the test "should, in fact, be slightly more stringent than 'one of reasonableness.'" *Spencer* v. *NLRB*, 712 F.2d 539, 558 (1983) (footnote omitted), cert. denied, 466 U.S. 936 (1984).[6] That court subsequently held that the government's position must be more than "'facially' reasonable" (*Cinciarelli* v. *Reagan*, 729 F.2d 801, 806 (D.C. Cir. 1984)), and that the government's position must have a "solid basis in fact and law." *Grace* v. *Burger*, 763 F.2d 457, 458 (D.C. Cir. 1985), cert. denied, No. 85-5557 (Dec. 9, 1985). But it also applied the same reasonableness test applied in the other circuits (*Hirschey* v. *FERC*, 760 F.2d 305, 309 (D.C. Cir. 1985)), so that there may be only a semantic distinction between the standard for substantial justification enunciated by the District of Columbia Circuit and the reasonableness test employed by all other circuits under the original EAJA. Since there may not be any functional difference between the two tests, and since the denial of fees in this case was appropriate in any event (see pp. 10-13, *infra*) review by this Court is not warranted.[7]

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[6] The court of appeals in *Spencer* referred to the committee reports cited above, but noted that the Senate Judiciary Committee had rejected an amendment to the bill that would have changed the phrase "substantially justified" to "reasonably justified." 712 F.2d at 557-558; see S. Rep. 96-253, *supra*, at 8. The joint conference report, which expressly adopts the reasonableness test for substantial justification, H.R. Conf. Rep. 96-1434, *supra*, at 22, is, however, a better indicator of congressional intent. See *United States* v. *Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1279 n.5 (7th Cir. 1986).

[7] This Court has recently declined to resolve a similar semantic difference in the circuits over the appropriate stand-

Petitioners also assert (Pet. 17) that certain statements in the legislative history of the 1985 Act, Pub. L. No. 99-80, 99 Stat. 183 *et seq.*, support their contention that "substantial justification" requires more than a showing of reasonableness. But even if the 1985 Act is applicable to this case, it would be wrong to read the conflicting comments in its legislative history as changing the law when the net result of the legislative process was that the 1985 Act adopted the same "substantial justification" standard as its predecessor. 28 U.S.C. 2412(d)(1)(A).

The House Report accompanying the bill does include the following comment on the test for substantial justification:

> Several courts have held correctly that "substantial justification" means more than merely reasonable. Because in 1980 Congress rejected a standard of "reasonably justified" in favor of "substantially justified," the test must be more than mere reasonableness.
>
> Especially puzzling, however, have been statements by some courts that an administrative decision may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act.

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ard for judicial review of an agency decision not to prepare an EIS. *Dravo Basic Materials Co.* v. *Louisiana*, cert. denied, No. 85-569 (Mar. 3, 1986); *River Road Alliance, Inc.* v. *Corps of Engineers*, cert. denied, Nos. 85-785 and 85-800 (Mar. 3, 1986); cf. *Gee* v. *Boyd*, cert. denied, No. 84-1062 (Apr. 22, 1985).

H.R. Rep. 99-120, 99th Cong., 1st Sess. 9-10 (1985) (footnotes omitted).[8] But the statements made in the House Report regarding the substantial justification standard were characterized as unrepresentative of the intent of the committee and were clarified during floor debates in both the House and the Senate. See 131 Cong. Rec. H4763 (daily ed. June 24, 1985), and 131 Cong. Rec. S9992-S9993 (daily ed. July 24, 1985).

The House Report's explanation of the substantial justification standard was directly contradicted by statements made during floor debates by three of the bill's co-sponsors. For example, Representative Kindness described the excerpt quoted above as a "gratuitously authoritarian overstatement" and "the only error I found in the report. * * * The committee report statement should not be interpreted to be the position of the committee on the point it seeks to describe" (131 Cong. Rec. H4763 (daily ed. June 24, 1985)). See also the comments of Representative Kastenmeier (*ibid.*), and Sen. Thurmond, 131 Cong. Rec. S9993 (daily ed. July 24, 1985). Moreover, in signing the 1985 Act, President Reagan stated that "it is my understanding * * * that the Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence." 21 Weekly Comp. Pres. Doc. 967 (Aug. 6, 1985). In view of Congress's reenactment of the same statutory language of 28 U.S.C. 2412(d)(1)(A), which had been

[8] A similar statement is found in the legislative history of another version of the EAJA, passed by Congress in 1984 but vetoed by the President. See S. Rep. 98-586, 98th Cong., 1st Sess. 10 (1984) and 42 Cong. Q. Weekly Rep. 2964 (1984).

repeatedly interpreted to impose a "reasonableness" test, the floor debates in both Houses, and the President's clear expression of intent in his signing statement, there is no basis for petitioners' assertion that the court of appeals erred in relying on cases articulating a reasonableness test.

One court of appeals has interpreted the 1985 Act to impose a more stringent test than reasonableness. *Gavette* v. *Office of Personnel Management*, *supra* (position must be "clearly reasonable"). Five other circuits have applied the traditional reasonableness test in decisions entered after the effective date of the 1985 Act without discussing whether there is any difference between the two Acts in this respect. *United States* v. *Yoffe*, 775 F.2d 447, 449-450 (1st Cir. 1985); *USLIFE Title Ins. Co.* v. *Harbison*, 784 F.2d 1238, 1242 (5th Cir. 1986); *United States* v. *Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1274 (7th Cir. 1986); *In re Hill*, 775 F.2d 1037, 1042 (9th Cir. 1985); *Porter* v. *Heckler*, 780 F.2d 920, 922 (11th Cir. 1986).

2. In any event, whichever statute applies and whether or not the 1985 Act requires a somewhat heightened scrutiny of the government's position, the court of appeals' conclusion that the government's position "was substantially justified" was correct. Petitioners assert (Pet. 26-35) that the court of appeals found BPA's position "arbitrary and capricious" and then contend that agency action held to be arbitrary and capricious cannot, as a matter of law, have been substantially justified. That is just wrong. First, while the court below did rule that BPA's action violated NEPA and said at one point (Pet. App. C39 n.5) that BPA's position was unreasonable, it did not find that action arbitrary and

capricious. See *Lathan* v. *Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974).[9] Loss of a case does not, of course, mean that the government's position was not substantially justified (H.R. Rep. 96-1418, *supra*, at 11), even if the government's actions were held to have been arbitrary and capricious. *Essex Electro Engineers, Inc.* v. *United States*, 757 F.2d 247, 253 (Fed. Cir. 1985).

Here, there was ample basis for the court of appeals to find that BPA's position was substantially justified. BPA's principal argument in this case was that the deadlines imposed by Congress in the Regional Act for the offer of contracts to BPA's customers made it impossible to prepare an EIS, and eliminated any requirement for one. Pet. App. C18-C19. In support of this position, BPA relied on *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, *supra*, in which this Court held that, when there is a "fundamental conflict of statutory duty," NEPA's impact statement requirement is inapplicable. 425 U.S. at 791. The Ninth Circuit rejected this argument, distinguishing the statutory deadlines in the Regional Act from the mandated deadlines in the statute at issue in *Flint Ridge*, and held that "there is no irreconcilable conflict between the Regional Act and NEPA requirements" (Pet. App. C30-C31). The court of appeals noted, however, that "there is at least a clear tension between NEPA's charge to the agency to evaluate the effects of action upon the environment and the command of the Regional Act that the contracts be in place within 21 months of its passage" (Pet. App. C33). The court consequently

[9] The words "arbitrary and capricious" were used in an explanation of the importance of an EIS in formulating agency policy, *not* to characterize BPA's decision that no EIS was required here. See Pet. App. C29.

declined the request of petitioners to enjoin the operation of the contracts. *Ibid.*[10]

The Ninth Circuit, in its denial of petitioners' fee application, described this case as a "case of first impression" (Pet. App. A2). Petitioners suggest (Pet. 14) that the court has "announced a rule that the government's position is always substantially justified in any case of 'first impression.' " This suggestion is without merit. The fact that a case is one of first impression is a factor properly relevant to the substantial justification determination. *In re Hill*, 775 F.2d at 1042; *United States* v. *Yoffe*, 775 F.2d at 451; *DuBose* v. *Pierce*, 761 F.2d at 918-919; *Sigmon Fuel Co.* v. *TVA*, 754 F.2d 162, 167 (6th Cir. 1985); *Herring* v. *United States*, 781 F.2d 119, 121-122 (8th Cir. 1986). Although petitioners correctly point out (Pet. 14-16) that the government's position is not necessarily substantially justified simply because the case is one of first impression (see *Devine* v. *Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984)), it is well established that the government may meet its burden under 28 U.S.C. 2412(d)(1)(A) by showing that its position was a "novel but credible extension or interpretation of the law." H.R. Rep. 96-

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[10] BPA also argued that an EIS was unnecessary because the power delivery contracts themselves do not significantly affect the human environment. Pet. App. C11. In support of this contention, the BPA relied on two Ninth Circuit decisions, *City of Santa Clara* v. *Andrus*, 572 F.2d 660, cert. denied, 439 U.S. 859 (1978); and *Sierra Club* v. *Hodel*, 544 F.2d 1036 (1976), for the proposition that federal agency actions that merely allocate federal power to different customers do not significantly affect the environment. Pet. App. C14. The court of appeals agreed that "BPA accurately characterizes the holding of these cases" (*ibid.*), but held that they were not controlling. Pet. App. C14-C18.

1418, *supra*, at 11. The court of appeals in this case, which involves the first NEPA challenge to actions taken pursuant to the Regional Act, clearly did not in its summary opinion rejecting petitioners' fee application set forth a *per se* rule regarding cases of first impression. Instead, it acted well within its discretion in denying petitioners' fee application.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1986

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[11] Petitioners also argue extensively (Pet. 32-35) that the "position of the United States" includes the underlying agency position as well as the government's litigation position. This argument merely restates what is clearly the law in the Ninth Circuit. *Rawlings* v. *Heckler*, 725 F.2d 1192, 1195-1196 (1984). The 1985 Act also adopts this view, rejecting the holdings of those circuits that had limited judicial review to the government's litigation position. See H.R. Rep. 99-120, *supra*, at 9, 11-13, 16.

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